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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., APPELLANT;

vs.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

FILED NOVEMBER 4, 1931

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA

EASTERN AIR TRANSPORT, INC., Complainant,

against

SOUTH CAROLINA TAX COMMISSION and W. G. QUERY, J. P. Derham and Frank C. Robinson, as Members of South Carolina Tax Commission, Defendants.

[fol. 3] BILL OF COMPLAINT—Filed April 16, 1931

To the Honorable, the Judge of the District Court of the United States for the Eastern District of South Carolina:

Eastern Air Transport, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, and a citizen and resident of the State of Delaware, on behalf of itself and of others similarly situated presents this its bill of complaint against the South Carolina Tax Commission and W. G. Query, J. P. Derham and Frank C. Robinson, as members of the South Carolina Tax Commission, and each of them, and alleges:

1. That the complainant is now and was at all times hereinafter mentioned a corporation duly created, organized and existing under the laws of the State of Delaware and a citizen and resident of the State of Delaware, having its principal office at No. 100 10th Street, in the City of [fol. 4] Wilmington, in said State, and is not and has not been a citizen or resident of the State of South Carolina.

2. That the defendants, W. G. Query, J. P. Derham and Frank C. Robinson, are citizens, residents and inhabitants of the State of South Carolina and of the Eastern District thereof, and that they are the duly and legally appointed, qualified and acting members of the defendant, South Carolina Tax Commission, and that as such members of the South Carolina Tax Commission they are charged with the duty of collecting certain taxes in the State of South Carolina, including particularly those taxes hereinafter mentioned.

3. That the grounds upon which the jurisdiction of this honorable Court depends are that this action arises under the laws of the United States and the provisions of the Constitution of the United States and the amendments thereto, that the complainant is a citizen, resident and inhabitant of one of the States of the United States other than the State of South Carolina, to wit: the State of Delaware; that each and all of the defendants are citizens, residents and inhabitants of the State of South Carolina; that a complete diversity of citizenship exists between the complainant and defendants in this action; that this is a civil suit in equity; and that the matter in dispute exceeds, exclusive of costs and interest, the sum of value of Three Thousand ($3,000.00) Dollars.

4. That this is a suit to enjoin the defendants from illegally enforcing or collecting an unconstitutional and illegal tax levied and imposed by the State of South Carolina and the defendants upon the complainant and its interstate business and commerce and the incidents thereof in violation of certain provisions of the Constitution and laws of the United States.

5. That the value of the right of complainant to do and transact said interstate business and commerce in and through the State of South Carolina without being subjected to said unconstitutional, illegal and void taxation is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

6. That unless the defendants be restrained and enjoined by this Court from said illegal enforcement and collection of said tax complainant will be forced by the defendants to [fol. 5] pay to the defendants and the State of South Carolina such tax on its interstate business in an amount in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, in order for complainant to carry on its interstate business and commerce as hereinafter more in detail set forth.

7. That complainant is now, and for a long time prior hereto has been, engaged in and intends to continue to carry on and transact interstate commerce and business, that is to say, Eastern Air Transport, Inc., is now, and for a long time prior hereto has been engaged in and in-

tends to continue to carry on and transact interstate commerce and business in the transportation of United States mail by airplanes for compensation and profit in and over the State of South Carolina from points outside of the boundaries thereof to points within, and from points within the State of South Carolina to points outside the boundaries thereof, and from points outside the State boundaries across the State of South Carolina to other points outside the boundaries thereof, and since December 10, 1930, has been similarly engaged in the transportation of passengers and their personal baggage, also small quantities of freight or express matter, all of which have been transported in complainant's airplanes, each and every one of which is and was engaged in making an interstate fight.

8. That the said interstate mail operations of complainant are carried on under and in accordance with the terms of a contract existing between the complainant and the United States Government for the regular transportation of United States air mail over a fixed and definite route approximately fifteen hundred (1,500) miles in length along the Eastern Seaboard of the United States from New York City (Newark, N. J., airport) via Philadelphia, Pa., Washington, D. C., Richmond, Va., Greensboro, N. C., Spartanburg, S. C., Greenville, S. C., Atlanta, Ga., and Jacksonville Fla. to its Southern terminus at Miami, Fla. complainant operating between Atlanta, Ga., and New York City, two planes per day each way on regular schedules, also, since April 1, 1931, an additional route with the airplanes of complainant stopping at the cities of Florence and Charleston, S. C., said contract for the carriage of mail [fol. 6] being dated the 7th day of November, 1930, and copy thereof hereto attached.

9. That the transportation operations of complainant in and over the State of South Carolina are exclusively in interstate commerce; that no mail, passengers or freight are accepted by complainant at either Greenville, Spartanburg, Florence or Charleston, for transportation solely to one of the other named points.

10. That it is necessary to generate the motive power used by complainant in the said operation and propulsion

of its said airplanes in said interstate commerce by the exclusive use of gasoline as fuel in the internal combustion motors of said airplanes.

11. That a considerable portion of said gasoline used by complainant as aforesaid on the said route is necessarily put into said airplanes at Spartanburg, S. C., and/or Greenville, S. C., and/or Florence, S. C., and/or Charleston, S. C., and that it is frequently necessary that complainant's airplanes refuel with gasoline at one or more of said cities in their operation across, into and out of the State of South Carolina.

12. That the said gasoline with which the said airplanes are refueled at Greenville, Spartanburg, Charleston and Florence, S. C., is an instrumentality of interstate commerce, and that it is impossible for said interstate commerce to be carried on without refueling at Greenville and/or Spartanburg and/or Charleston and/or Florence, S. C.

13. That an Act of the General Assembly of the State of South Carolina, approved February 23, 1922 (South Carolina Acts 1922, pages 835-838) as amended by Act No. 146 of 1923, Act No. 731 of 1924, Act No. 34 of 1925, and Act No. 102 of 1929 (South Carolina Acts, 1929, pages 107-112) provides in part:

"Section 1. License Tax on Dealers in Gasoline—Collection.—Be it enacted by the General Assembly of the State of South Carolina: That every oil company, person, firm or corporation doing domestic or intra-state business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose [fol. 7] of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitute therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State. That every oil company subject to the tax provided for in this

Act shall, on or before the 20th day of each month, and every month, make out and file with the South Carolina Tax Commission a return under oath, in such form as may be prescribed by said South Carolina Tax Commission showing the number of gallons of gasoline, combinations thereof, or substitutes therefor, which have been sold or consigned, used, shipped or distributed for the purpose of sale within the State during the previous month and shall at the same time remit to the State Treasurer the amount of the tax provided by this Act. And every such oil company shall keep a record, or records, showing all purchases and dispositions of all gasoline, combinations thereof, or substitutes therefor, and such records shall be at all times subject to inspection by any agent of the South Carolina Tax Commission or the Department of Agriculture, Commerce and Industry."

"Section 2. Distribution of Proceeds.—The license tax of six (6) cents per gallon on gasoline as herein levied and provided for shall be distributed as follows:

"Five (5c) cents on each gallon shall be turned over to the State Highway Department for the purposes of said Department and one (1c) cent per gallon shall be distributed to the Counties of the State to be used exclusively for the construction and maintenance of County roads, and the distribution of the one (1c) cent per gallon license tax among the Counties shall be on the same basis and by the same method as now provided by law for the distribution [fol. 8] of the two (2c) cents gasoline tax formerly or heretofore distributed among the Counties."

"Section 3. Use of Portion Allotted to State Highway Department.—Out of the five (5c) cents gasoline tax herein allocated for the purposes of the State Highway Department, together with other current income or other funds of said Department, the State Highway Commission or Department shall make payments or reimbursements as follows:

"(a) The appraised value of any hard surfaced roads, or concrete bridges connecting with other States, now in the State Highway System constructed by any County or Counties either before or after the passage of Act. No. 731, of the Acts of 1924, shall be reimbursed or paid to such County, reimbursements to be made on the basis of

valuation for hard surfaced roads provided for in Section 3 of Act No. 731 of the Acts of 1924. Such reimbursements shall be made to such county in annual installments over the period of years ending in 1943. All unpaid obligations of the State Highway Commission coming under the provisions of this clause shall bear interest at the rate of four and one-half per centum per annum, payable semi-annually, or if any County shall have issued bonds for said paving, then interest shall be paid by said Highway Commission to such County at the rate borne by the bond of said county, such interest to be paid semi-annually. No payments shall be made under this clause for roads constructed under reimbursements agreements referred to in clause (c) of this Section.

"(b) The amounts which the State Highway Commission has or shall have by agreements made with Counties or highway or bridge districts since the passage of Act No. 731 of the Acts of 1924, or hereafter made, agreed to pay as reimbursement for constructing State highways, or for advancing money for said purposes shall be reimbursed or paid to such County or highway or bridge districts. All unpaid obligations of the State Highway Commission coming under the provisions of this clause shall bear interest [fol. 9] at the rate borne by any bonds or other obligations issued by Counties or highway or bridge districts for the purpose of obtaining funds advanced and/or used for the construction of State highways. In any case where any County or highway or bridge district has advanced money to the State Highway Commission from sources other than from the sale of bonds or notes bearing a fixed rate of interest, the interest paid on such amounts shall be at the rate of four and one-half per centum per annum, payable annually. Payments of interest required by this Section to be made at the rate borne by bonds or other obligations shall be made at or before the times when the interest on said bonds or other obligations fall due. The interest required to be paid to Counties or highway or bridge districts under the provisions of this Section shall be computed from the date of approval of this Act by the Governor:

"(c) In any case where the portion of the gasoline tax which is required by laws enacted prior to this Act to be

distributed to Counties has been lawfully pledged in whole or in part for, or is required by law to be applied, in whole or in part, to the payment of the principal and/or interest of any bonds or other obligations, the State Highway Commission shall pay said principal and/or interest at or before the times when said principal and/or interest become due. The payments and reimbursements required by this Section shall have priority over any other payments authorized or required by law to be made out of the gasoline tax or other current income of the State Highway Department."

"Section 4. In Lieu of Former Tax.—The license tax of six (6) cents per gallon on gasoline as herein levied and provided for shall be in lieu of the gasoline tax of five (5) cents per gallon heretofore levied, assessed and collected by law. All provisions of law now relating to the collection of the gasoline tax are hereby re-enacted."

* * * * * * *

"Approved the 16th day of March A. D. 1929."

[fol. 10] 14. That Section 4 of the Act above set forth provides among other things that all provisions of law now relating to the collection of the gasoline tax are hereby re-enacted. That Section 10 of Act No. 34 of 1929 provides that upon failure of any oil company or dealer to pay the tax above mentioned, said oil company or dealer shall be guilty of a misdemeanor and upon conviction thereof subject to heavy penalties in the form of fines and imprisonment.

15. That under the provisions of the said Acts and amendments thereto above referred to the defendants as members of the South Carolina Tax Commission are charged with and exercise the duty of collection the said tax and enforcing the same.

16. That complainant is now and for a long time prior hereto has been buying gasoline at Greenville, S. C., and Spartanburg, S. C., and since April 1, 1931, at Charleston and Florence, S. C., for the purpose of refueling its airplanes at said points; that said gasoline bought at said cities is used by complainant only in its said interstate

operations and none of said gasoline is diverted to be used by others or for local or intrastate use.

17. Complainant has been and is now paying over and above the price per gallon for said gasoline an additional amount of six (6) cents per gallon on all of said gasoline delivered in South Carolina as a tax enacted by the defendants and the State of South Carolina; that complainant pays said tax to the oil companies or dealers from which complainant purchases said gasoline, and that said oil companies or dealers deliver the said tax of six (6) cents per gallon monthly to the defendants as members of the South Carolina Tax Commission. That said oil companies and dealers in collecting said tax from complainant and delivering it to the defendants are acting as defendants' agents and agents of the State of South Carolina.

18. That said tax is not an ad valorem or property tax, but is a license or excise tax.

19. That the said Acts and amendments thereto imposing said tax are revenue Acts only and were not enacted [fol. 11] as police regulations and were not intended to promote morality, health or public security and order.

20. That Act No. 101 of 1929 (South Carolina Acts 1929, pages 105, 106), requires oil companies and dealers in gasoline to file bond with the South Carolina Tax Commission conditioned upon payment by all oil companies and dealers of all gasoline taxes due under the Acts and amendments thereto above mentioned.

21. Complainant alleges on information and belief that the defendants would criminally prosecute any producer, refiner or distributor of gasoline for the sale or delivery of gasoline to complainant for the aforesaid use without collecting and remitting said tax at the rate of six (6) cents per gallon, and it is now impossible for complainant to obtain in South Carolina from any producer, refiner or distributor or from any other source any gasoline for use in its interstate commerce and business without the defendants exacting and collecting the said six (6) cents per gallon tax thereon.

22. That complainant cannot take delivery of said gasoline at a point outside the State of South Carolina and

privately bring same into the State of South Carolina by tank car or otherwise for its own use, because it is deterred and prevented from so doing because of Act No. 833 of 1930 (South Carolina Acts, 1930, pages 1390-1392), which Act provides that any gasoline brought into the State of South Carolina for private use shall after being stored within this state for a period of twenty-four hours or more be subjected to the payment of a license tax of six (6) cents per gallon, and said Act further provides heavy penalties for failure to comply with the terms thereof.

23. That the said tax amounts to approximately thirty-five (35%) per cent of the untaxed cost of said gasoline, and that said tax is a tax on the consumption and use of said gasoline.

24. The amount of said tax increases in constant and direct proportion to the amount of said interstate business transacted by complainant.

25. That said tax is designed, levied and collected as a charge for the use and upkeep of the public roads, high- [fol. 12] ways and bridges of the State of South Carolina by motor vehicles. That five (5) cents of the six (6) cents per gallon tax is used by the Highway Commission of the State of South Carolina for the constructions, maintenance and upkeep of public roads in the State Highway System of South Carolina; that the remaining one (1) cent of the six (6) cents per gallon tax is distributed to the various Counties of the State of South Carolina to be used exclusively for the construction and maintenance of County roads.

26. That complainant has not, does not and does not intend to use the public roads, highways, bridges or County roads in the State of South Carolina, that the airplanes of complainant travel entirely in the air and off the earth, and there is no rational relationship between the said gasoline tax as imposed on complainant and the purposes of same, nor are any benefits derived by complainant from the State of South Carolina therefor.

27. That a part of the gasoline necessarily taken in its airplanes at Greenville and/or Spartanburg and/or Florence and/or Charleston, S. C., by complainant is consumed

in and over the State of South Carolina, and a portion thereof is required to generate power with which to propel said airplanes from the boundaries of the State of South Carolina to the nearest adequate and proper refueling points outside of the State of South Carolina; that it is not feasible or possible to refuel said airplanes at the points where they cross the boundaries of the State of South Carolina in entering or leaving said State.

28. That the said Act and the amendments thereto is unconstitutional, illegal and void insofar as same applies or is applied to complainant or its said business or operations, for the reason that the same directly burdens and interferes with interstate commerce, and particularly for the reason that the said Act and the defendants' administration thereof directly burdens and interferes with the said interstate commerce and business of complainant in transporting and carrying mail and/or passengers and/or freight and/or express by airplane; and the said Act and the said administration thereof is unconstitutional, il- [fol. 13] legal and void because it conflicts with, offends against and is in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, which provides as follows:

"Powers of Congress—The Congress shall have power to: (3) Commerce. To regulate commerce with foreign nations and among the several States, and within the Indian tribes."

in that the said Act and its said administration by the defendants purports to impose and levy, and does impose and levy an occupation, license or excise tax on gasoline delivered to or purchased, taken on for refueling or used by complainant as fuel in the State of South Carolina to propel said airplanes flying in interstate commerce between said State and neighboring States and across said State between other States, thus enacting said tax as the price of the privilege of using an instrumentality of interstate commerce, and thus invading the exclusive power of Congress to regulate commerce between the several states.

29. That the proceeds derived from said tax are used exclusively to build and maintain public roads, highways and bridges in the State of South Carolina, and is and

was intended to place the burden of road and bridge building and maintenance on those using motor vehicles on said roads and bridges; that complainant does not use any of said roads or bridges for the operation of its airplanes and therefore the burden of said tax on complainant and its business bears no rational relationship to the purpose of said taxation, or any benefits received by complainant from the State, and there is no rational relationship between the business of complainant and the purpose of said tax, and insofar as said tax applies or is applied to gasoline used by complainant as fuel in its said airplanes in interstate commerce the same is in violation of Clause 3, Section 8, Article 1 of the Constitution of the United States.

30. That the said Act is in violation of the Fourteenth Amendment of the Constitution of the United States in that the said tax levied and imposed against complainant de- [fol. 14] prives complainant of its property without due process of law, for the reason that said Act imposes the collection of a tax for the construction, maintenance and upkeep of public highways, roads and bridges in the State of South Carolina, and complainant does not use in any way or derive any benefits from any of the public highways, roads or bridges of the State of South Carolina in the maintenance, operation or propulsion of its said airplanes in said interstate commerce.

31. That complainant has paid said tax on all gasoline used for refueling its said airplanes in South Carolina in order that it might use said airplanes in said interstate commerce. It has been and is impossible for complainant to purchase gasoline within the State of South Carolina without the payment of said tax because of the heavy penalties and punishments provided against any refiner, producer or dealer who should sell or attempt to sell gasoline to complainant without collecting said tax.

32. That there is no provision in the said Act imposing said gasoline tax for the recovery of money paid to the defendants and the State of South Carolina as gasoline tax, even though said tax may not have been owed by the taxpayer.

33. Complainant alleges that unless the defendants are enjoined and restrained from enforcing or attempting to

enforce the said Act and amendments thereto imposing the said gasoline tax that complainant and all others similarly situated will sustain irreparable loss, damage and injury in each of the following particulars:

"(a) That the complainant and all others similarly situated will be compelled to pay taxes imposed pursuant to an invalid and unconstitutional enactment and pursuant to an illegal and unconstitutional administration of said enactment.

"(b) That unless the injunctive relief herein sought be granted the said interstate business of complainant will daily be burdened, interfered with and damaged.

"(c) That the further enforcement of said Act and the amendments thereto will have the effect of injuring or impairing all lawful business in which complainant and [fol. 15] others similarly situated are engaged, and in which they have a right to engage, which right is guaranteed by the Constitution of the United States."

Inasmuch, therefore, as the complainant is without any adequate remedy at law and can obtain relief only in a Court of Equity, complainant prays:

"1. That writs of subpoena be issued to each of said defendants requiring each of them to answer this complaint fully and truthfully.

"2. That each and all of the defendants and their successors in office be herewith temporarily restrained and be enjoined after final hearing from enforcing against complainant and all others similarly situated any of the provisions of the said Act and amendments thereto, and from collecting or taking any steps to enforce the provisions of said Act for the gasoline which will be used as aforesaid.

"3. That said Act and amendments thereto be construed as not applying to complainant or its said business or operations or the incidents thereof, or the gasoline that it consumes aforesaid.

"4. That said Act be declared unconstitutional in its enforcement and attempted and threatened enforcement and administration against complainant and its business

and operations and the incidents thereof and the said gasoline it uses.

"5. That this Honorable Court set a date as early as may be convenient for interlocutory hearing hereon before three Federal Judges as provided by law.

"6. That other persons, corporations, partnerships or associations similarly situated at their request may be permitted to intervene in this suit.

"7. That complainant have such other and further relief as in the premises it may appear to the Court complainant is entitled to."

Cuthell, White, Hotchkiss & Mills, Benet, Shand & McGowan, Solicitors for Complainant.

[fols. 16-39] *Duly sworn to by Harold A. Elliott. Jurat omitted in printing.*

[fol. 40] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed May 8, 1931

This matter comes before me on the verified bill of complaint of Eastern Air Transport, Inc., and accompanying affidavits attacking the constitutionality of an Act of the General Assembly of the State of South Carolina, approved February 25, 1922 (South Carolina Acts, 1922, pages 835-38), and amendments thereto, imposing a tax upon the business of selling, consigning, using, shipping or distributing for the purpose of sale within the State of South Carolina any gasoline, or any substitute therefor or combination thereof.

It appears that due notice was given to the defendants that the complainant would so appear and apply for a temporary restraining order restraining the South Carolina Tax Commission from enforcing, or attempting to enforce, against the complainants any of the provisions of the Acts and amendments in question.

After hearing arguments from counsel for complainant and defendants and it appearing that irreparable loss and damage will result to the complainant unless a temporary restraining order is granted restraining the enforcement,

operation and execution of the said statute against the complainant pending the convening of a Court composed of three Judges, as in such cases is provided by the statutes of the United States.

Now, therefore, it is ordered, decreed and adjudged that the defendants, and each of them, their successors in office, their agents, servants, employees and attorneys, be and they are hereby enjoined and restrained from enforcing, or at- [fols. 41 & 42] tempting to enforce, directly or indirectly, against the complainant any of the provisions of the said Act and amendments thereto, and from collecting, or attempting to collect, the tax of six cents per gallon on gasoline purchased by complainant within the State of South Carolina for use in its airplanes engaged in interstate commerce, pending a decision by the Court composed of three Judges as required by the statutes of the United States.

It is further ordered that the complainant herein shall within five days from the date of the entry of this order file with the Clerk of this Court a bond, to be approved by the Clerk, in the sum of five thousand dollars, conditioned upon the payment of such costs and damages as may be incurred or suffered by the issuance of this order, if it shall finally be decided that such restraining order should not have been issued.

J. Lyles Glenn, Judge U. S. District Court, Eastern District of South Carolina.

May 7, 1931.

[fol. 43] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. C. KING—Filed May 8, 1931

STATE OF SOUTH CAROLINA,
County of Richland:

Personally appeared before me J. C. King, who, being duly sworn, says that he is branch manager of the South Carolina branch of Standard Oil Company of New Jersey. That South Carolina branch of said company includes all of the State of South Carolina.

That on account of the South Carolina gasoline tax the sum of six cents per gallon is added to the price of all gaso-

line sold by Standard Oil Company of New Jersey in South Carolina, except gasoline sold in tank car lots, on which the tax is paid by the purchaser under the terms of the South Carolina Statute, or to the United States Government. The said sum of six cents per gallon tax is paid by the purchasers of gasoline to Standard Oil Company of New Jersey and is remitted by Standard Oil Company of New Jersey to South Carolina Tax Commission.

That Standard Oil Company of New Jersey would not sell gasoline in South Carolina to Eastern Air Transport, Inc., or to any other purchasers, unless the additional sum of six cents per gallon was paid to cover the South Carolina gasoline tax.

J. C. King.

Sworn to before me this 5th day of June, 1931. Geo. L. Dick, Notary Public for S. C. (Seal.)

[fol. 44] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF H. A. ELLIOTT

STATE OF NEW YORK,
County of Kings, ss:

H. A. Elliott, being first duly sworn, deposes and says as follows:

I am the Vice President of Eastern Air Transport, Inc., the above complainant, and have been since July 1929. As such Vice President I am thoroughly familiar with all matters and details relating to the operations of said Eastern Air Transport, Inc. and this affidavit is made in my capacity as Vice President aforesaid.

Eastern Air Transport, Inc. is a corporation organized and existing under the laws of the State of Delaware, as evidenced by the certified copy of its Articles of Incorporation and amendments hereto annexed as Exhibit A. It is not, and never has been, incorporated in the State of South Carolina. Its principal office is at No. 100 Tenth Street, in the City of Wilmington, State of Delaware.

The matter in dispute in this proceeding exceeds, exclusive of costs and interest, the sum or value of $3,000.00,

in that the additional amount paid to Standard Oil Company of New Jersey on gasoline purchased from it by Eastern Air Transport, to wit: the sum of 6 cents on each gallon purchased, which said sum represents the amount of the tax imposed by the laws of the State of South Carolina, for the [fol. 45] twelve months' period ending March 31, 1931 is the sum of $3254.88. Since April 1st, the company has been operating an additional service into and over the State of South Carolina, so that the amount which will be paid over subsequent periods of twelve months will exceed said sum. As a carrier of United States mail in interstate transportation, as hereinafter set out, the amount paid to Eastern Air Transport, Inc. exceeds the sum of $100,000.00 a month, while the receipts from its passenger operations, from the fares paid by the passengers carried in interstate commerce, is in excess of the sum of $15,000.00 a month.

Eastern Air Transport, Inc. operates (weather permitting) into and out of the State of South Carolina each day eight airplanes carrying passengers and United States mail, the latter pursuant to the provisions of a contract with the Post Office Department of the United States, a copy whereof was filed with the bill of complaint in this cause, and to which reference is hereby made. Its operations begin at Newark Airport, Newark, New Jersey, and continue through and over the states of New Jersey, Pennsylvania, Delaware, Maryland, the District of Columbia, Virginia, North Carolina, South Carolina, Georgia and Florida, with its terminus at Miami. Its planes make stops in the State of South Carolina at the cities of Spartanburg, Greenville, Florence and Charleston. It sells no tickets and carries no passengers solely between any of the aforesaid cities in the State of South Carolina. It does carry passengers from outside of the State of South Carolina to the cities aforesaid, and it does carry passengers from those cities to points outside of the State of South Carolina. It carries United States mail from points outside of the State of South Carolina to the cities aforesaid, and receives United States mail at those cities and carries the same to points outside of the State of South Carolina. In a few instances it has, at the direction of the Post Office Department, carried one or more pouches of mail between Spartanburg and Greenville or between Charleston and Florence, but in each and every instance, such mail was carried on an airplane whose journey began

outside of the State of South Carolina and which merely passed through said state, ending its journey at some point outside of the said State of South Carolina. But in all such [fol. 46] instances the mail so carried was transported along with a much larger quantity of mail originating outside of the State of South Carolina and destined to a point in that State or to points in other states, and the same gasoline was used to provide the motive power for the plane carrying the mail pouches between the cities aforesaid and the mail pouches being carried in interstate transportation. It would be absolutely impossible in a practicable way, or even by a mathematical formula, to segregate the gasoline used to provide the motive power for carrying one or two mail pouches between points within the state and the gasoline used to provide the motive power to carry mail pouches in interstate shipments when, as in every instance, all such mail pouches were carried by the same airplane at the same time. Eastern Air Transport, Inc. does not operate any airplanes on journeys commencing and ending within the State of South Carolina.

The motive power of the airplanes is derived from internal combustion engines, in which gasoline is used for fuel which gasoline is of a special type designed solely for use in aircraft engines, and is not suitable for use in automobiles. In its operations, it is necessary for Eastern Air Transport, Inc. to refuel its airplanes regularly at Spartanburg and Florence, and occasionally at Greenville and Charleston. Its operations cannot be carried on without such refuelings. All of the gasoline so used at the points aforesaid is purchased from the Standard Oil Company of New Jersey, pursuant to contract. Eastern Air Transport, Inc. pays to said Standard Oil Company of New Jersey a certain price per gallon for gasoline, and in addition, pays to it a tax of 6 cents per gallon on all gasoline so purchased as evidenced by one of said Standard Oil Company's invoices hereto annexed, marked Exhibit B, which said invoice is similar in form to all other invoices. Eastern Air Transport has never been able to purchase gasoline in the State of South Carolina without the payment of the tax thereon, and on information and belief, this deponent avers that it is impossible to buy from said Standard Oil Company of New Jersey, or any other distributor of gasoline in the

State of South Carolina, without paying to such distributor, in addition to the price of the gasoline, the additional sum [fol. 47] of 6 cents per gallon thereon, representing the amount of the tax imposed by the State of South Carolina. On information and belief, this deponent avers that the amounts paid by it of 6 cents per gallon on each gallon of gasoline purchased by it within the State of South Carolina, and shown on the invoices rendered to it by said Standard Oil Company of New Jersey, are remitted by said company to the tax authorities of the State of South Carolina. Deponent further says on information and belief that unless said sum of 6 cents per gallon is paid on each gallon of gasoline purchased by it in the State of South Carolina, it would be unable to purchase gasoline from said Standard Oil Company of New Jersey or any other distributor.

It is the purpose and intent of Eastern Air Transport, Inc. to continue in the future its business in the same manner as it is now carried on, that is to say, the carriage of passengers and mail over the route commencing at Newark, New Jersey Airport, through the states aforesaid, including the State of South Carolina, and terminating in the State of Florida, and unless the collection of said tax of 6 cents per gallon is enjoined, Eastern Air Transport, Inc. will be compelled to pay the same on all gasoline purchased by it in the State of South Carolina.

In the operations of Eastern Air Transport, Inc. it would not be possible for it to purchase gasoline outside of the State of South Carolina, bring the same into said state, and use all of said gasoline to refuel its planes within 24 hours after the same is brought into the state.

In the operations of the airplanes of Eastern Air Transport, Inc. it does not use and does not intend to use the public roads, highways, bridges, or county roads in the State of South Carolina, as its airplanes travel entirely in the air and off the earth, except when ending or beginning a flight within the said state and when so ending or beginning a flight, the airplane comes to rest or starts from landing fields owned and operated by the municipalities of the cities above referred to, and neither in landing nor taking off from said fields do the airplanes of Eastern Air Transport, Inc. use the public roads, highways, bridges or county roads in the State of South Carolina.

[fols. 48-62] A portion of the gasoline taken into the airplanes of Eastern Air Transport, Inc. at Spartanburg and/or Greenville and/or Florence and/or Charleston is consumed in the motors in said airplanes in and over the State of South Carolina, and another portion is used to generate power to propel said airplanes from and over the boundaries of said State of South Carolina to the nearest available refueling point outside of said State, it not being possible or feasible to refuel said airplanes at the point where they cross the boundaries of South Carolina in entering or leaving said State.

And further the deponent saieth not.

H. A. Elliott.

Subscribed and sworn to before me this 11th day of June, 1931. Edward E. Skinner, Notary Public.

[fol. 63] IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 25, 1931

The joint and several answer of the defendants South Carolina Tax Commission and W. G. Query, J. P. Derham and Frank C. Robinson, as members of South Carolina Tax Commission, to the bill of complaint of the plaintiff above named respectfully shows:

1. Defendants have no knowledge as to the allegations contained in paragraph one (1) of the bill of complaint.

2. Defendants admit the allegations contained in paragraph two (2) of the bill of complaint.

3. Defendants deny so much of paragraph three (3) of the bill of complaint as alleges that this action arises under the laws of the United States and the provisions of the Constitution of the United States and the Amendments [fol. 64] thereto. Defendants have not knowledge sufficient to form a belief as to whether complainant is a citizen, resident and inhabitant of a state other than the State of South Carolina.

Further answering paragraph three (3), defendants have not knowledge or information sufficient to form a belief as to whether the matter in dispute exceeds, exclusive of

costs and interest, the sum or value of Three Thousand ($3,000.00) Dollars and, therefore, deny the same.

4. Defendants deny the allegations contained in paragraph four (4) of the bill of complaint.

5. Defendants deny so much of paragraph five (5) of the bill of complaint as alleges that it is being subjected to said unconstitutional, illegal and void taxation and allege that they have not knowledge or information sufficient to form a belief as to whether the value of the right of complainant to do and transact interstate business and commerc in and through the State of South Carolina is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

6. Defendants deny the allegations contained in paragraph six (6) of the bill of complaint.

7. Defendants have no knowledge as to the allegations contained in paragraph seven (7) of the bill of complaint.

8. Defendants have no knowledge as to the allegations contained in paragraph — (8) of the bill of complaint.

[fol. 65] 9. Defendants have no knowledge as to the allegations contained in paragraph nine (9) of the bill of complaint.

10. Defendants have no knowledge as to the allegations contained in paragraph ten (10) of the bill of complaint.

11. Defendants have no knowledge as to the allegations contained in paragraph eleven (11) of the bill of complaint.

12. Defendants deny the allegations contained in paragraph twelve (12) of the bill of complaint.

13. Defendants admit the allegations contained in paragraph thirteen (13) of the bill of complaint.

14. Defendants admit the allegations contained in paragraph fourteen (14) of the bill of complaint.

15. Defendants admit the allegations contained in paragraph fifteen (15) of the bill of complaint.

16. Defendants have no knowledge as to the allegations contained in paragraph sixteen (16) of the bill of complaint.

17. Defendants deny the allegations contained in paragraph seventeen (17) of the bill of complaint.

[fol. 66] 18. Defendants admit the allegations contained in paragraph eighteen (18) of the bill of complaint.

19. Defendants admit the allegations contained in paragraph nineteen (19) of the bill of complaint.

20. Defendants admit the allegations contained in paragraph twenty (20) of the bill of complaint.

21. Defendants deny the allegations contained in paragraph twenty-one (21) of the bill of complaint.

22. Defendants deny the allegations contained in paragraph twenty-two (22) of the bill of complaint.

23. Defendants deny the allegations contained in paragraph twenty-three (23) of the bill of complaint.

24. Defendants deny the allegations contained in paragraph twenty-four (24) of the bill of complaint.

25. Defendants admit the allegations contained in paragraph twenty-five (25) of the bill of complaint.

26. Defendants deny the allegations contained in paragraph twenty-six (26) of the bill of complaint.

[fol. 67] 27. Defendants have no knowledge as to the allegations contained in paragraph twenty-seven (27) of the bill of complaint.

28. Defendants deny the allegations contained in paragraph twenty-eight (28) of the bill of complaint.

29. Defendants admit so much of paragraph twenty-nine (29) of the bill of complaint as alleges that the revenues derived from said tax are used exclusively to build and maintain public highways, but they deny that said tax was intended to place the burden of road and bridge building maintenance on those exclusively using motor vehicles on said roads and bridges. Defendants deny each and every other allegation contained in paragraph twenty-nine (29) of said bill of complaint.

30. Defendants deny the allegations contained in paragraph thirty (30) of the bill of complaint.

31. Defendants deny the allegations contained in paragraph thirty-one (31) of the bill of complaint.

32. Defendants admit so much of paragraph thirty-two (32) of the bill of complaint as alleges that there is no provision in said Act imposing said gasoline tax for the recovery of taxes paid even though said tax may not have been owed by the taxpayer, but these defendants allege that complainant has paid no tax under the provisions of the Act [fol. 68] referred to in the bill of complaint and defendants have not demanded the payment of any tax from it.

33. Defendants deny the allegations contained in paragraph thirty-three (33) of the bill of complaint

For a first further separate and distinct defense defendants allege that the Act of the Legislature of South Carolina referred to in the bill of complaint has no application to complainant; that neither South Carolina Tax Commission nor any of the other defendants officially, individually or collectively have construed said Act as applying to complainant; they have made no demand upon complainant for the payment of any tax whatsoever, have made no threats against complainant of prosecuting it, or taking any other action whatsoever against it; that none of said defendants have made any claim or demand against complainant whatsoever and they do not intend to and will not make any claim for any tax penalty against complainant under the provisions of the Act of the Legislature referred to in the bill of complaint. That complainant has paid no tax to South Carolina Tax Commission nor to any member thereof, nor to any agent or employee thereof, under the provisions of the Act set forth in the bill of complaint, nor under any other Act of the Legislature of South Carolina.

[fol. 69] For a second further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendants say that the facts alleged in said bill of complaint are insufficient to constitute a valid cause of action in equity.

For a third further, separate and distinct defense it appears from the face of said bill of complaint that the supposed grounds of jurisdiction of a federal court are frivolous with no facts alleged sufficient to show or make

it appear that any real substantial federal question is involved.

For a fourth further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendants say that for the purposes of this suit South Carolina Tax Commission is in fact and in law the State of South Carolina and this Court is without jurisdiction to entertain this suit so far as this defendant is concerned as provided by Article XI of Amendments to the Federal Constitution.

Wherefore, defendants deny that the complainant is entitled to the relief prayed for in the bill of complaint or any part thereof, or to any other relief against these defendants, and pray that the bill of complaint be dismissed with costs.

John M. Daniel, Attorney General; J. Fraser Lyon, Attorneys for Defendants.

[fol. 70] *Duly sworn to by W. G. Query. Jurat omitted in printing.*

[fol. 71] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. G. QUERY

Personally appeared W. G. Query who first being duly sworn, deposes and says:

That he is a member and Chairman of South Carolina Tax Commission and is familiar with the records of the office of the Tax Commission relating to the assessment and collection of the tax imposed upon dealers in gasoline for the privilege of selling the same, and with the records showing the licenses issued to dealers in gasoline by South Carolina Tax Commission.

That Eastern Air Transport, Inc., has not applied for, nor has it been issued a license to deal in gasoline or otherwise dispose of gasoline within the State of South Carolina.

That Eastern Air Transport, Inc., has paid no tax whatsoever to South Carolina Tax Commission and that any allegation in the bill of complaint herein which may allege [fol. 72] directly or by inference that complainant has paid any tax to the Tax Commission or to any agent of the Tax

Commission for the privilege of using gasoline in its aeroplanes or otherwise is without foundation in either law or in fact.

W. G. Query.

Sworn to before me this 21st day of May, 1931. Mrs. G. W. Jones, Notary Public for South Carolina.

[fol. 73] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. G. QUERY IN REPLY TO AFFIDAVITS OF HAROLD W. BEISLEY, J. C. KING AND H. A. ELLIOTT

STATE OF SOUTH CAROLINA,
County of Richland:

W. G. Query, being first duly sworn, deposes and says as follows:

I am Chairman of South Carolina Tax Commission and am familiar with the administration of the law and collection of the tax on corporations and persons for the privilege of dealing in gasoline in this State, that is the business of selling, consigning, using, shipping or distributing for the purpose of sale within this State of any gasoline or substitute therefor, etc., being Act No. 102, approved March 16, 1929.

I am also familiar with Act No. 101, approved 4th day of March, 1929, whereby gasoline dealers are required to file [fol. 74] bond and secure license from South Caroline Tax Commission to engage in such business.

Also an Act approved the 14th day of May, 1931, amendatory to the last above named Act.

Attached to this affidavit and marked "Exhibit A," is a copy of the application of Standard Oil Company of New Jersey to South Carolina Tax Commission for license to deal in gasoline, etc.

Attached hereto is a letter of Standard Oil Company of New Jersey signed J. C. King, Manager, in relation to application for license to deal in gasoline, and marked "Exhibit A-1."

Attached hereto is copy of letter of W. G. Query, Chairman South Carolina Tax Commission addressed to Stand-

ard Oil Company of New Jersey in regard to issuance of license, marked "Exhibit A-2."

Attached hereto is copy of gasoline Dealers' license issued to Standard Oil Company of New Jersey by South Carolina Tax Commission, marked "Exhibit A-3."

Eastern Air Transport, Inc., has made no application to South Carolina Tax Commission for a gasoline dealers' license in this State and does not pay and is not under any law of South Carolina required to pay to South Carolina Tax Commission any tax on gasoline or any tax on account of being a dealer in gasoline or any substitute therefor; that there is no statute or Act of the Legislature requiring Eastern Air Transport, Inc., or any other vehicle bringing into this State gasoline in the tanks of its motor propelled vehicle used for the propulsion of such vehicle, and South Carolina Tax Commission has never claimed or demanded the payment of any tax from Eastern Air Transport, Inc., for or [fol. 75] on account of any gasoline that it may have brought into this State in its aeroplanes nor for any it may have purchased in this State and carried out of said State in interstate commerce, or otherwise.

Standard Oil Company of New Jersey is not an agent or representative in any capacity of South Carolina Tax Commission for the collection of any tax whatsoever, or for any other purpose. It is licensed to deal in gasoline and is required to pay to South Carolina Tax Commission a graduated license tax based upon the number of gallons of gasoline sold and used by it at the rate of six cents per gallon, and the obligation to pay said tax is in no wise influenced or dependent upon whether it absorbs the tax or adds the amount equal to the tax to the price of each gallon of gasoline it may sell.

If Standard Oil Company of New Jersey adds six cents per gallon to the price of its gasoline it charges Eastern Air Transport, Inc., it is a matter of private contract and agreement between said Companies and has no relation to nor effect upon the liability of Standard Oil Company of New Jersey to pay a license tax to South Carolina Tax Commission at the rate of six cents per gallon. Standard Oil Company of New Jersey is one of the largest tax payers in South Carolina. In addition to the taxes paid for the privilege of dealing in gasoline, its taxes amount to several hundred

thousand dollars per year. These taxes consist of income tax, property tax, corporation license tax and documentary stamp tax. South Carolina Tax Commission has no knowledge whether Standard Oil Company of New Jersey increases the price of gasoline it sells within this State by the amount of these latter taxes it is required to pay, but whether it absorbs such taxes or whether it increases the price of [fol. 76] gasoline to Eastern Air Transport, Inc. and its other customers sufficiently to pay this tax, is a matter of no legal concern to South Carolina Tax Commission, as Standard Oil Company of New Jersey is required to pay these taxes just as it is required to pay the gasoline dealers license tax.

In case Standard Oil Company of New Jersey, or other person or corporation in like situation, sells a tank car lot of gasoline to a dealer who resells the same within the State of South Carolina, Standard Oil Company of New Jersey is not required to pay a tax on account of such sale, but the seller or distributor who purchases gasoline under such circumstances when it or he sells or uses the same, is required to pay the tax thereon at the rate of six cents per gallon for the privilege of selling said gasoline.

Attached hereto is a copy of a letter dated May 27, 1931, signed by J. C. King, Manager Standard Oil Company of New Jersey, addressed to W. G. Query, Chairman of South Carolina Tax Commission, and marked "Exhibit B."

Attached hereto is a copy of a letter of W. G. Query, Chairman South Carolina Tax Commission, addressed to J. C. King, Manager Standard Oil Company of New Jersey, dated June 2, in reply to the last above letter, and marked "Exhibit B-1."

That Standard Oil Company of New Jersey, as required by law, makes monthly report to South Carolina Tax Commission showing the number of gallons of gasoline it sold, used, etc., during the previous month, and showing the amount of tax it is required to pay therefor.

[fol. 77] Attached hereto and marked Exhibits "C", "D", "E", "F", and "G", are copies of monthly reports of Standard Oil Company of New Jersey to South Carolina Tax Commission filed in 1931, together with copies of letters of J. C. King, Manager of Standard Oil Company of New Jersey transmitting the same.

The original files containing the above records will be offered to the Court for its inspection, if it should so desire.

The original monthly reports of Standard Oil Company of New Jersey for the year 1930 will be tendered the Court for its inspection if it should desire to examine same. The reports for the year 1930 are of the same form and substance as the reports filed in 1931.

That South Carolina Tax Commission, nor any of its members have any knowledge as to whom Standard Oil Company of New Jersey sells gasoline within the State of South Carolina, or elsewhere, except that on some of the monthly reports made to South Carolina Tax Commission there is a list of tank car lots sold to corporations and persons who are dealers in gasoline in South Carolina and who resell the same, and also to such sales as are made to agencies of the United States Government.

Dealers in gasoline in South Carolina who sell gasoline to water craft, dry cleaners, to textile plants for finishing purposes, to those who use stationary engines, no matter whether such stationary engines are used to operate cotton gins, saw mills, rock crushing, concrete mixing, mining, thrashing machines, grist mills, small town lighting plants, or otherwise, and to those who use farm machinery, none of which are operated on the highways of this State, such seller [fols. 78-102] of gasoline is nevertheless required and does pay the tax for the privilege of selling such gasoline so used at the rate of six cents per gallon. The only exemption allowed to a seller of gasoline in this State is when a sale is made to an agency of the Federal Government, and it makes no difference if the buyer of gasoline operates his automobile or truck entirely within an incorporated city or town, which city or town receives no benefit from the revenue derived from the tax on dealers in gasoline.

W. G. Query.

Sworn to before me this 13 day of June, 1931. Mrs. T. W. Jones, Notary Public for South Carolina. Seal. (L. S.)

[fol. 103] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF B. R. STROUP

STATE OF SOUTH CAROLINA,
County of Richland:

B. R. Stroup, being first duly sworn, deposes and says as follows:

I am Assistant Maintenance Engineer of the South Carolina State Highway Department and am familiar with the highways, roads and streets leading to the airports of Charleston, Florence, Greenville and Spartanburg, which airports are being used by planes of the Eastern Air Transport, Inc.

That the airport at Charleston, S. C., is located approximately eleven miles from the post office in Charleston, and that the streets, highways and roads between the post office and the airport were built and are being maintained as follows:

Approximately 3 miles of paved city streets within the city limits of Charleston, built and maintained by the City of Charleston; approximately 7 miles of U. S. Highway #17 paved and maintained by the South Carolina State [fol. 104] Highway Department; and approximately 1 mile of earth road leading from U. S. Highway #17 to the airport, built and being maintained by the County of Charleston.

That the airport at Florence, S. C., is located approximately 2½ miles from the post office in Florence and that the streets, highways and roads between the post office and the airport were built and are being maintained as follows:

Approximately 1 mile of paved city streets, built and maintained by the City of Florence; approximately 1 mile of U. S. Highway #17 paved and maintained by the South Carolina State Highway Department; and a connecting link between the airport and U. S. Route #17 of sand-clay type, approximately ½ mile long, built and maintained by the City of Florence with the assistance of the County of Florence.

That the airport at Greenville, S. C., is located approximately 4 miles from the post office at Greenville and that the streets, highways and roads between the post office and

the airport were built and are being maintained as follows:

Approximately 1 mile of paved streets built and maintained by the City of Greenville; approximately 2 miles of paved U. S. Highway #76 built and maintained by the South Carolina State Highway Department; and a connecting link approximately 1 mile long between the airport and U. S. Route #76, of top-soil construction, built and maintained by the County of Greenville.

That the airport at Spartanburg, S. C., is located approximately 4½ miles from the City of Spartanburg between a County paved highway and State Route #10, which is a paved highway, and that the streets, highways and roads between the above mentioned points were built and are being maintained as follows:

(1) Over State Route #10.—Approximately 1½ miles of paved city streets, built and maintained by the City of Spartanburg; approximately 2 miles of paved State Route [fol. 105] #10, built and maintained by the South Carolina State Highway Department; and approximately 1 mile of bituminous surfacing or surface treatment, which is a connecting link between the airport and State Route #10, built and being maintained by the County of Spartanburg.

(2) Over County Paved Highway.—Approximately 3 miles built by the U. S. Army and the City of Spartanburg, and now being maintained by City and County of Spartanburg; approximately ½ mile of paved highway built by the South Carolina State Highway Department, and when the State Highway was re-located this section was turned over to the County of Spartanburg for maintenance; and approximately ½ mile of bituminous surfacing or surface treated highway, a connecting link between the airport and the County highway, built and being maintained by the County of Spartanburg.

B. R. Stroup.

Sworn to before me this 13th day of June, 1931.
Margaret Burton, Notary Public for South Carolina. (L. S.)

[fol. 106] IN UNITED STATES DISTRICT COURT

ORDER CALLING THREE JUDGE COURT—Filed May 28, 1931

In this suit application is made for an interlocutory injunction, enjoining the South Carolina Tax Commission, a State agency of the State of South Carolina, from the enforcement of one of the State Tax Laws. The grounds involve the constitutionality under the Federal Constitution of the state statute in so far as it affects the Complainants. From the record it is clear that this case should be heard by a Court of three Judges, convened under Section 266 of the Judicial Code, (Title 28 U. S. C. A. Section 380).

It is therefore ordered that the Honorable John J. Parker, United States Circuit Judge of the 4th Judicial Circuit, and the Honorable Ernest F. Cochran, United States District Judge of the Eastern District of South Carolina be and they are hereby called to the assistance of the undersigned, Honorable J. Lyles Glenn, and the Court as thus constituted be the Court to hear and determine this case.

Ordered further that the Honorable John J. Parker and Ernest F. Cochran be forthwith furnished with a copy of this order.

A separate order is to be filed fixing the time and place for hearing.

J. Lyles Glenn, U. S. District Judge.

Rock Hill, S. C., May 28th, 1931.

[fol. 107] IN UNITED STATES DISTRICT COURT

OPINION—Filed Sept. 4, 1931

PARKER, Circuit Judge:

This is a suit to restrain the collection of the South Carolina gasoline tax with respect to gasoline sold to complainant, Eastern Air Transport, Inc., on the ground that as to such gasoline the tax imposes a burden upon interstate commerce in violation of the Commerce Clause of the Constitution of the United States. (Constitution, Article 1, paragraph 8, Clause 3.) An interlocutory injunction restraining the collection of the tax is asked, and a court of

three judges has been convened pursuant to section 266 of the Judicial Code.

Complainant is a Delaware corporation operating air transport lines in interstate commerce across the state of South Carolina. Its planes stop at Greenville, Spartanburg, Florence and Charleston in that state, but do not carry freight or passengers between these cities, practically its entire business in South Carolina being interstate in character. At these points, however, it purchases gasoline from the Standard Oil Company for the use of its planes; and that company charges complainant six cents per gallon more for same that it otherwise would because it is required by the state of South Carolina to pay a dealer's license tax of that amount. The suit is instituted against the members of the South Carolina Tax Commission to enjoin them from collecting this tax from the Standard Oil Company with respect to the gasoline sold complainant, on the theory that, as complainant is engaged in interstate commerce and uses the gasoline purchased in carrying on same, the tax is a burden on interstate commerce which may not be imposed by the state. Although complainant is not required to pay the tax itself, the burden of same falls upon it, and the [fol. 108] doctrine laid down in Station WBT Inc. v. Poulnot, 46 Fed. (2d) 671 is invoked as sustaining the right of complainant to maintain the suit. There is no question but that the jurisdictional amount is involved.

The South Carolina statute imposing the tax is Act No. 102, approved March 16, 1929, S. C. Acts 1929 pp. 107-112. The pertinent portion thereof is as follows:

"That every oil company, person, firm or corporation doing domestic or intrastate business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combination thereof, or substitutes therefor, sold or consigned, used,

shipped or distributed for the purpose of sale within the State."

It may be well to note that the act approved April 4, 1930 (Acts 1930 pp. 1390-1392) imposing a tax of six cents per gallon on all persons importing gasoline into the state which is "intended to be stored or used for consumption in the state" has no application to the case at bar. Complainant is not importing or storing gasoline for use in the state of South Carolina and is in no wise affected by that statute, whether it be constitutional or not. It is affected by the gasoline tax statutes only with respect to its purchases from the Standard Oil Company, and, as to these, only because that company is taxed on the basis of its sales and passes the tax on to its customers through an increase in the price charged them. The sole question in the case, therefore, is the validity of the tax imposed by the act of 1929 upon the Standard Oil Company when measured by its sales of gasoline which the purchaser intends to use and does use in [fol. 109] carrying on interstate commerce. We think that the tax is valid.

We attach no importance to the fact that the tax is described in the statute as a privilege or license tax; for where such tax is measured by sales, it is in effect a sales tax, whatever it may be called. Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 222. And, although not a property tax within the meaning of the South Carolina Constitution, but an excise tax (Gregg Dy-ing Co. v. Tax Commission, — S. C. —, — S. E. —), it must be treated as in effect a tax upon the property sold for determining questions arising under the Federal Constitution. Kehrer v. Stewart 197 U. S. 60; Welton v. Missouri, 91 U. S. 275; Brown v. Maryland, 12 Wheat. 425. But the rule is that, the right of a state — tax property within its borders or transactions therein occurring is practically unlimited, except that it may not tax interstate commerce or burden such commerce by taxing the instrumentalities used in carrying it on or violate other constitutional provisions not here material. The sale, being completed within the state of South Carolina, is, of course, not a transaction in interstate commerce. The question in the case, then, comes to this: whether at the time of the sale, which is the transaction by which the tax is measured, the gasoline which is the subject of the sale can be regarded as

in instrumentality of such commerce. We think this question must be answered in the negative. The gasoline assumes the character of such an instrumentality only because of the use made of it after the sale is complete.

The question arises whether the fact that at the time of the sale, the purchaser intends that the gasoline shall be used in carrying on interstate commerce and buys it for that purpose, affects the right of the state to tax the sale. [fol. 110] The answer to this is that the criterion by which the right of the state is to be judged is not the intention of the purchaser but the status of the property at the time of the transaction. As said by Mr. Justice McKenna in Heisler v. Thomas Colliery Co., 260 U. S. 245, 159, "If the possibility, or, indeed, certainty of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are varying percentages destined for and surely to be exported to states other than those of their production."

In Oliver Iron Co. v. Lord, 262 U. S. 172, the state of Minnesota had imposed a tax on the business of mining iron ore measured by a percentage of the value of the ore mined or produced. Substantially all of the ore when mined was loaded on cars and shipped into other states to satisfy existing contracts. In holding that the tax on production was not a burden on interstate commerce though the ore was destined for transportation in such commerce even before it was mined, the court, speaking through Mr. Justice Van Devanter, said:

[fol. 111] "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only

in respect to the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation or railroad and telegraph lines does, but this is not a forbidden burden or interference."

The same holding has been made with respect to the production tax on gas (Hope Natural Gas Co. v. Hall 274 U. S. 284); a tax on coal prepared and "ready for shipment or market" and destined for a market in other states (Heisler v. Thomas Colliery Co., supra); and a manufacturing tax upon goods sold in interstate commerce (American Mfg. Co. v. St. Louis 250 U. S. 459). A state has the same right to tax sales that it has to tax the production of gas, the mining of coal or the manufacture of merchandise; and, if destination of the product for use or shipment in interstate commerce does not affect the power of the state to tax in these cases, there is no reason why the intention that property sold should be used in carrying on interstate commerce should affect the right of the state to tax its sale. No one, we think, would contend that a railroad operating a coal mine could escape the production tax on coal because it was intended to use the coal in carrying on interstate commerce; and we see no reason why a sales tax on coal or on oil would not be equally valid.

The leading case dealing with the right of the state to tax property intended for interstate commerce is Coe v. Errol 116 U. S. 517. In that case it was held that goods intended for transportation to another state are liable to taxation as a part of the general mass of property of the state in which they are situate until actually started in transportation to the state of their destination. The criterion applied in that and later cases (see Crescent Oil [fol. 112] Co. v. Mississippi 257 U. S. 129; Heisler v. Thomas Colliery Co., supra) is thus stated by Mr. Justice Bradley: "Such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from

taxation merely because it is, by its owner, intended for exportation." While that case dealt with property intended for transportation in interstate commerce, it is clear that the same principle is applicable in the case of property intended for use in interstate commerce and that such property is withdrawn from the taxing power of the state only when such use is actually begun.

A different question would be presented if the taxing statute made discrimination between ordinary sales of gasoline and sales of gasoline intended for use or transportation in interstate commerce. Such discrimination would constitute an attempt on the part of the state to burden interstate commerce which is not permissable. Cf. Welton v. Missouri, supra, 91 U. S. 277. But there is no discrimination in the tax here. Sales of gasoline intended for use in interstate commerce are taxed in the same way and at the same rate as other sales. The tax is a mere revenue measure imposed upon purely intrastate transactions and there is no attempt whatever to discriminate against the gasoline which is intended for subsequent use in interstate commerce.

The case of Nelson v. Kentucky 279 U. S. 245, upon which complainant particularly relies, is not in point. In that case a statute of Kentucky taxed the use of gasoline within [fol. 113] the state. The state officials brought action to recover the tax from the operators of a ferry boat who purchased gasoline in Illinois and used same in operating an interstate ferry boat. The question of the right of Kentucky to tax sales of gasoline intended for use in interstate commerce was not involved. The question was the right of that state to tax the use in interstate commerce or gasoline purchased in another state. It was held that the state was without power to tax the use of an instrumentality of interstate commerce, which is manifestly a very different question from that involved in the right of the state to tax the sale within its borders of an article designed by the purchaser for use in interstate commerce. As said by Mr. Justice Sutherland in Hart Refineries v. Harmon 278 U. S. 499, 503, "the difference between an excise tax based on sales and one based on use of property is obvious and substantial."

We have carefully examined the cases of U. S. Airways v. Shaw 43 Fed. (2d) 148 and Mid-Continent Air Express Corp. v. Lujan 47 Fed. (2d) 266, upon which complainant

relies. In so far as these cases deny to a state the right to impose a tax on sales occurring within its borders because the purchaser intends to use the property purchased in carrying on interstate commerce, we think that they press the doctrine of the Helson case too far; and, while we have great respect for the courts which rendered these decisions, we cannot follow them in that holding. It appears, however, that the statutes dealt with in these cases taxed the use of gasoline within the state and not merely the sale; and the right to tax the use in interstate commerce, as we have shown above, is a very different matter from the right to tax the sale before the use in interstate commerce begins. In so far, therefore, as these cases deal with the right to tax the use of gasoline in interstate commerce, they decide [fol. 114] a question which is not before this court.

It is said, however, that the Supreme Court of South Carolina, in the recent case of Gregg Dying Co. v. Tax Commission — S. C. —, S. E. —, has construed the gasoline tax statutes of South Carolina as intended to impose a tax on the ultimate consumer, and that hence the statute in question is to be treated as a tax on the use. We do not think that this conclusion follows. The Gregg case passed upon the validity of the act of 1930 which imposed a tax upon gasoline brought into the state and intended to be "stored or used for consumption" therein, and, as we have seen, that statute is not here involved, nor is the portion of the former statute taxing use. It is true that the court adverted to the obvious shifting of the sales tax to the ultimate consumer and said that it was the purpose of the legislature in passing the act of 1930 that all consumers should pay the gallonage tax of six cents; but the fact remains that, whether shifted or not, the tax imposed by the act of 1929 so far as measured by sales is a tax on sales occurring within the state, which the state has a right to tax. Even though the legislature may have known that the sales tax would be shifted to the ultimate consumer by increase in price and may have passed the tax intending this result to follow, this did not affect its power to tax sales as shown above, nor does it exempt sales from taxation merely because the purchaser may intend that the property purchased be used in interstate commerce. As said by Mr. Justice McKenna in Heisler v. Thomas Colliery Co., supra, 260 U. S. 245, 259, "whether any statute or action

of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the [fol. 115] motive which impelled it."

Complainant relies upon the decisions in Panhandle Oil Co. v. Mississippi, supra, 277 U. S. 218, and Indian Motorcycle Co. v. U. S. — U. S. —, 51 S. C. Ct. Rep. 601, and argues that, because the state may not collect a sale tax upon a sale made to an agency of the federal government, nor the latter collect such tax upon a sale made to an agency of the state, such tax may not be collected from a sale made to one engaged in interstate commerce where the property is to be used in such commerce. The conclusion does not follow. In the case of a sale to the federal government or a state, it is the character of one of the parties to the transaction which exempts it from taxation. In the case of a purchase for use in interstate commerce, the character of the parties has nothing to do with the matter. It is the use in interstate commerce which exempts the property from taxation at the hands of the state; and, as heretofore shown, this use cannot arise until after the sale is complete. The basis of the decisions relating to the purchases by the state and federal governments is thus stated by Mr. Justice Butler in the Panhandle Oil case:

"The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the state and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes."

And in the Indian Motorcycle case, Mr. Justice Van Devanter stated the basis of the rule as follows:

"Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a sin-
[fol. 116] gle transaction, in which the purchaser is an essential participant. Without that participation the sale

could not be effected. Thus, the transaction falls, within the class which the United States cannot tax consistently with the constitutional principle."

It is argued in support of the tax that, even if it be construed as a tax upon an instrumentality of interstate commerce, it should be sustained under the decisions of Clark vs. Poor 274 U. S. 554, and Kane vs. New Jersey, 242 U. S. 160. It is said that the gasoline tax is devoted to the maintenance of the roads in South Carolina, and that, although the planes of complainant do not use the roads, the maintenance of the public roads is important to the carrying on of complainant's business, as such roads must be maintained to its air ports for the benefit of its passengers and, as the upkeep of such roads leading to the cities near which its air ports are located facilitates its business and increases its patronage. Much can be said in favor of this position. See Boeing Air Transport, Inc. vs. Edelman — Fed. (2d) —. We base our conclusion that the tax is valid, however, on the fact that the sale by which the tax is measured is not a transaction in interstate commerce, and that the gasoline sold does not become an instrumentality of such commerce until after the sale is complete.

For the reasons stated, we think that the interlocutory injunction prayed for should be denied.

Interlocutory Injunction Denied.

We concur:

John J. Parker, U. S. Circuit Judge. Ernest F. Cochran, U. S. District Judge. J. Lyles Glenn, U. S. District Judge.

[fol. 117] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed September 4, 1931.

In the above entitled cause, the Court, after considering the pleadings and affidavits and hearing argument of counsel on motion for interlocutory injunction, finds the following facts:

1. That complainant is a corporation duly created and existing under and by virtue of the laws of the State of Delaware, and for the purposes of this suit is to be deemed a citizen of the State of Delaware.

2. That the defendant W. G. Query, J. P. Derham and Frank C. Robinson are citizens and residents of the state of South Carolina, and are members of the Tax Commission of said state.

3. That the amount in controversy in the suit exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4. That the Legislature of South Carolina, at its session for the year 1929, enacted a revenue statute approved March 16, 1929, known as Act No. 102, the provision of which pertinent to this case is as follows:

"That every oil company, person, firm or corporation doing domestic or intrastate business within this State, and engaging in the business of selling, consigning, using, ship-
[fol. 118] ping, or distributing for the purpose of sale within this State, and gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales or such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combination thereof, or substitute therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State."

5. That complainant operates in interstate commerce air transport lines across the state of South Carolina; that its planes operated on said lines make regular stops at Greenville, Spartanburg, Florence and Charleston in said State, but do not carry freight or passengers between these cities, and practically the entire business of complainant in South Carolina is interstate in character.

6. That at Greenville, Spartanburg, Florence and Charleston, in the State of South Carolina, complainant purchases gasoline from the Standard Oil Company for the use of its planes which are being used in interstate commerce; that the Standard Oil Company adds to the price

of the gasoline which it sells to complainant the amount of the gasoline tax which it is required to pay by the Tax Commission of the state of South Carolina under the statute aforesaid; that complainant, because of the collection of the said tax measured by the sales made to it as aforesaid, is required to pay to the Standard Oil Company six cents per gallon more for the gasoline purchased than it would be required to pay if the said tax were not exacted on said sales; and that the amount which complainant is required to pay to the Standard Oil Company for gasoline purchased in South Carolina as aforesaid, over and above the amount which it would pay if the said tax were not exacted, amounts to $5,000,00 per year or more.

7. That the moneys derived by the state of South Carolina from the gasoline tax aforesaid are used exclusively [fol. 119] to maintain public roads, highways and bridges in the state of South Carolina; that said roads, highways and bridges are not used by the planes of complainant, but the maintenance of the public roads of the state is important to the carrying on of complainant's business, such roads must be maintained to its air ports for the benefit of its passengers and as the upkeep of such roads leading to the cities near which its air ports are located facilitates its business and increases its patronage.

8. That complainant has instituted this suit to enjoin the defendants, Tax Commission of the State of South Carolina, from collecting from the Standard Oil Company the tax aforesaid on the sales of gasoline made by the Standard Oil Company to complainant; that if the defendants are not enjoined from collecting said tax they will collect same from the Standard Oil Company and that company will increase by the amount of the tax collected from it the price of gasoline which it sells to complainant, so that the burden of the tax will eventually fall upon complainant; and that complainant has no remedy at law by which it may recover from the state of South Carolina the tax so paid.

Conclusions of Law

Upon the foregoing findings of fact the Court concludes as a matter of law:

1. That the statute aforesaid is valid and constitutional.

2. That the collection of the tax from the Standard Oil Company measured by sales made to complainant of gasoline for use in its planes is not a burden upon interstate commerce, as such gasoline does not become an instrumentality in interstate commerce until the use in such commerce begins, which is after the sale to complainant is complete.

[fol. 120] 3. That the State of South Carolina has the right to collect the tax imposed by the statute upon sales of gasoline made and completed within the state, even though the purchaser may intend to use the gasoline in carrying on interstate commerce.

4. That complainant is not entitled to the interlocutory injunction prayed.

This 31st day of August, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern District of South Carolina. J. Lyles Glenn, United States District Judge for the State of South Carolina.

[fol. 121] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

EASTERN AIR TRANSPORT, INC., Complainant,

versus

SOUTH CAROLINA TAX COMMISSION and W. G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, as Members of South Carolina Tax Commission, Defendants

DECREE DENYING INTERLOCUTORY INJUNCTION—Filed September 4, 1931

This cause coming on to be heard on application of complainant for interlocutory injunction before the undersigned constituting a court of three judges convened pursuant to section 266 of the Judicial Code, and being heard upon the bill, answer, affidavits and arguments of counsel; and the

Court having made and filed its findings of fact and conclusions of law as required by the equity rule of the Supreme Court, and being of opinion for the reasons therein stated, and more fully set forth in the written opinion filed herewith, that complainant is not entitled to the interlocutory injunction prayed:

Now, therefore, it is ordered and decreed that the interlocutory injunction prayed for be, and the same is hereby denied; and it is further ordered that the temporary restraining order heretofore granted be dissolved, provided, however, that the said temporary restraining order shall be continued in force for thirty days from this date for the purpose of preserving the status quo until the complainant shall have had opportunity to determine whether it will [fol. 122] appeal to the Supreme Court and take such steps as may be necessary for the preservation of its rights pending appeal.

And this cause is retained for further orders.

This 31st day of August, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern District of South Carolina. J. Lyles Glenn, United States District Judge for the State of South Carolina.

[fol. 123] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed September 28, 1931

To the Honorable John J. Parker, Circuit Judge; Ernest F. Cochran and J. Lyles Glenn, District Judges, acting as a District Court pursuant to Section 266 as amended of the Judicial Code of the United States.

The above named complainant feeling aggrieved by the decree rendered and entered in the above entitled cause on the 31st day of August, 1931, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme

Court of the United States sitting at Washington, District of Columbia, under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made. And it further prays that, upon giving bond in such amount as this Court may require, this Court pending an appeal to the United States Supreme Court will enjoin and restrain the South Carolina Tax Commission and the members thereof from enforcing, or seeking to enforce, as to complainant the provisions of the act in question, to wit: S. C. Acts 1929, pp. 107-112, and from collecting, or seeking [fol. 124] to collect any tax upon gasoline purchased by complainant in the State of South Carolina for use in its interstate air transportation.

Respectfully, Cuthell, White, Hotchkiss & Mills, Benet, Shand & McGowan, Attorneys for Complainant.

[fol. 125] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 28, 1931

Now comes the complainant in the above entitled cause and files the following assignment of erors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 31st day of August, 1931.

I

That the United States District Court for the Eastern District of South Carolina erred in failing to find from the uncontradicted evidence that complainant could not operate its airplanes and conduct its interstate passenger and freight business without purchasing gasoline in the State of South Carolina, complainant being compelled to make stops within said State by virtue of its contract with the United States for the carriage of mails into and out of said State of South Carolina.

II

That the United States District Court for the Eastern District of South Carolina erred in its finding of fact numbered 7, wherein it found that "the upkeep of such roads leading to the cities near which its air ports are located facilitates [fol. 126] its business and increases its patronage", there being no evidence in the record to sustain such finding.

III

That the United States District Court for the Eastern District of South Carolina erred in its conclusions of law numbered 1, to the effect that the Statute of the State of South Caroline involved in this controversy "is valid and constitutional", in that the evidence showed that said Statute in its application to complainant imposed a burden upon an instrumentality of interstate commerce.

IV

That the United States District Court for the Eastern District of South Carolina erred in its conclusion of law numbered 2, wherein it held that: "the collection of the tax from the Standard Oil Company measured by sales made to complainant of gasoline for use in its planes is not a burden upon interstate commerce, as such gasoline does not become an instrumentality in interstate commerce until the use in such commerce begins, which is after the sale to complainant is complete," in that the tax in question was shown to be a tax upon the use of said gasoline in interstate commerce.

V

That the United States District Court for the Eastern District of South Carolina erred in its conclusion of law numbered 3 as follows: "That the State of South Carolina has the right to collect the tax imposed by the Statute upon sales of gasoline made and completed within the State, even though the purchaser may intend to use the gasoline in carrying on interstate commerce," in that the tax in question was shown to be a tax upon the use of said gasoline in interstate commerce, and the tax imposed thereon to be a burden upon an instrumentality of interstate commerce.

[fol. 127]

VI

That the United States District Court for the Eastern District of South Carolina erred in its conclusion of law numbered 4, "that complainant is not entitled to the interlocutory injunction prayed," because the act, against the enforcement of which the interlocutory injunction was sought, imposes a burden upon an instrumentality of interstate commerce.

VII

That the United States District Court for the Eastern District of South Carolina erred in failing to find that the act of the State of South Carolina, approved March 16, 1929, S. C. Acts 1929, pp. 107-112 (the pertinent portion of which is set out in the opinion of the Court), which imposes a tax of 6 cents per gallon on all gasoline sold or consigned, used, shipped or distributed within the State of South Carolina resulted in a burden upon the business of interstate commerce conducted and carried on by complainant, and hence said law is unconstitutional, null and void as to this complainant's interstate air transportation business since it violates Article 1, Paragraph 8, Clause 3, of the Constitution of the United States.

VIII

That the United States District Court for the Eastern District of South Carolina erred in declining and refusing to grant to the complainant an interlocutory injunction against the South Carolina Tax Commission restraining them from the collection of the tax imposed by the laws of the State of South Carolina upon gasoline purchased by complainant and used by it in the conduct of its interstate airplane freight and passenger business.

IX

That the United States District Court for the Eastern District of South Carolina erred in failing to find that the [fol. 128] tax imposed by the act in question is a tax upon the use of gasoline in the State of South Carolina.

Wherefore the complainant prays that the said decree be reversed and that said District Court for the Eastern Dis-

trict of South Carolina be ordered to enter a decree reversing its decision in this cause.

Cuthell, White, Hotchkiss & Mills, Benet, Shand & McGowan, Attorneys for Complainant.

September 24, 1931.

[fol. 129] IN UNITED STATES DISTRICT COURT

EASTERN AIR TRANSPORT, INC., Complainant,

vs.

SOUTH CAROLINA TAX COMMISSION and W. G. QUERY, J. P. DEBHAM, and FRANK C. ROBINSON, as Members of South Carolina Tax Commission, Defendants

ORDER ALLOWING APPEAL AND RESTRAINING DEFENDANTS PENDING APPEAL—Filed September 28, 1931.

The complainant herein having petitioned to this Court praying that it be allowed an appeal to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and praying also that pending such appeal to the United States Supreme Court that the defendants be enjoined and restrained from enforcing, or attempting to enforce, as to complainant, the terms of a certain Act of the General Assembly of the State of South Carolina, South Carolina Acts 1929, pages 107-112.

Now on motion of solicitors for complainant, and with the consent of J. Fraser Lyon, Esq., solicitor for the defendants,

It is ordered:

That the appeal herein to the United States Supreme Court is allowed as prayed for.

It is further ordered that pending such appeal and until final order herein, the defendants, and each of them, their successors in office, their agents, servants, employees and attorneys be and they are hereby enjoined and restrained from enforcing, or attempting to enforce, directly or indirectly, against the Complainant, any of the provisions of the said act above mentioned, to wit, South Carolina Acts 1929, pages 107-112, and from collecting or attempting

[fols. 130-136] to collect tax of six cents per gallon on gasoline purchased by complainant within the State of South Carolina for use in its airplanes engaged in interstate commerce.

It is further ordered that complainant shall within five days from the date of the entry of this order file with the Clerk of this Court a bond to be approved by the Clerk in the sum of Five Thousand ($5,000.00) Dollars, conditioned upon the payment of such costs and damages as may be incurred or suffered by the issuance of this order and because of the appeal herein allowed.

This Sept. 25, 1931.

John J. Parker, Circuit Judge; Ernest F. Cochran, District Judge; J. Lyles Glenn, District Judge, Sitting as the District Court Pursuant to Section 266 as Amended of the Judicial Code of the United States.

I consent to the above order and to the amount of the bond as therein provided and that said order may be signed by the Judges of this Court individually and not in open Court.

(Sd.) J. Fraser Lyon, Attorney for South Carolina Tax Commission, and W. G. Query, J. P. Derham, and Frank C. Robinson, as Members of South Carolina Tax Commission.

Sept. 24, 1931.

[fols. 137-139] Citation, in usual form, showing service on J. Fraser Lyon, Filed October 7, 1931, omitted in printing.

[fols. 140 & 141] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed Nov. 11, 1931

Comes now the appellant in the above-entitled cause, and states that the points upon which it intends to rely in this Honorable Court in this case are as follows:

(See paragraphs III to IX of assignments of error.)

[fol. 142] Appellant designates the following parts of the record as necessary for the consideration of this case, the same only to be printed:

	Record page
1. Bill of Complaint	3
2. Temporary Restraining Order	40
3. Affidavit of H. A. Elliott	44
4. Answer	63
5. Affidavit of W. G. Query, attached to Answer	71-73-103
6. Order calling Three-Judge Court	106
7. Opinion	107
8. Findings of Fact and Conclusions of Law	117
9. Decree Denying Interlocutory Injunction	121
10. Petition for Appeal	123
11. Assignment of Errors	125
12. Order Allowing Appeal and Restraining Defendants Pending Appeal	129
13. Citation	137
14. Acceptance of Service of Citation	138

Note: Since the points to be relied upon are paragraphs III to IX, both inclusive, of the Assignment of Errors, it will be unnecessary to print both the points relied on and the Assignment of Errors, so it is suggested that as the latter includes all of the former, the latter only be printed.

William H. White, Attorneys for Appellant.

November 9th, 1931.

Service of a copy of the foregoing accepted this 9th day of November, 1931.

J. Fraser Lyon, Attorney for Appellees.

[fol. 143] [File endorsement omitted.]

[fols. 144 & 145] IN SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLEES OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED—Filed Nov. 21, 1931

South Carolina Tax Commission, W. G. Query, J. P. Derham and Frank C. Robinson, as members of South

Carolina Tax Commission, the appellees in the above entitled cause, hereby designate the following parts of the record which they think material in addition to the parts of the record set forth in the statement filed by appellant herein, pursuant to paragraph 9 of the Supreme Court Rule #13, viz:

1. Affidavit of J. C. King, page 43,
2. Affidavit of W. G. Query in reply to other affidavits, page 73, omitting all exhibits attached to said affidavit from "A" to "G", inclusive,
3. Affidavit of B. R. Stroup, page 103.

J. Fraser Lyon, Attorney for Appellees.

November 19, 1931.

Service of a copy of the foregoing accepted this 19th day of November, 1931.

Cuthell, White, Hotchkiss & Mills, Benet, Shand & McGowan, Attorneys for Appellant.

[fol. 146] [File endorsement omitted.]

File No. 36,318. E. South Carolina, D. C. U. S. Term No. 504. Eastern Air Transport, Inc., Appellant, vs. South Carolina Tax Commission and W. G. Query, J. P. Derhan and Frank C. Robinson, etc. Filed November 4, 1931. File No. 36,318.